ORIGIN AND DEVELOPMENT OF LEGAL RECOURSE AGAINST THE GOVERNMENT IN THE UNITED STATES.*

Progressive as this country has in many ways been from the first, it was very slow to grasp the idea that a citizen should be able to bring the Government into court in civil suits as readily as he can bring an individual or a corporation; and while it is now more than forty years since a court was established in which the United States could be sued, and thousands of judgments have been rendered against it, yet even at this day the jurisdiction of that court, broad as it undoubtedly is, does not embrace all reasonable causes of action.

The most striking instance of the injustice from which American citizens suffered for nearly eighty years after the adoption of the Constitution, through inability to enforce by legal process the Government's obligations towards them, is that of the French Spoliation Claims, so well known to the descendants of the merchants and shipowners of the last decade of the eighteenth century. These claims, originally against the French Government, became, in consequence of the treaty of 1801, obligations of our own Government towards its citizens, and obligations of a most sacred character, being in fact a part of the price of the independence of the United States; but they were never recognized as legal obligations at all, and it is only within about twenty years that any of them were paid, while many still await payment.

No one can read the history of the War of Independence without realizing that without the aid of France that war would probably have been a ghastly failure, but our his-

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tories are usually silent as to the price which the struggling colonies agreed to pay for French aid. That price was a guarantee, by this country to France, "forever, against all other powers", of all the then possessions of France in America, including the West Indies, as well as those it might acquire by any future treaty of peace, and also a grant of exclusive privileges in bringing prizes into our ports in any war. It is true that the treaties of 1778 were made with the well-meaning, if weak, Louis XVI, and not with the bloody oligarchy who judicially murdered him in 1793, but the so-called French Republic deemed itself the heir of the monarchy, as far as treaty rights were concerned, and when we stood neutral in its war with England, France severely punished what it called our breach of faith. Though the French Navy and privateers could do little against British warships, they were at least able to capture some hundreds of unarmed American merchantmen, in spite of the fact that both countries had bound themselves to protect each other's commerce. Of course, if the treaties of 1778 were not binding upon us, neither were they binding on France, so that we could not fairly charge France with treaty breaking; but the wholesale spoliations were acts of war, although no war had been declared.

Wise diplomacy restored peaceful relations between the two countries, and at the negotiations which ended in the treaty of 1801 the United States presented the claims of its citizens for losses due to the capture of their ships and cargoes by France, while that country claimed indemnity for the failure of the United States to fulfill its obligations under the treaties of 1778. In the end both countries renounced their respective claims, or, in other words, the United States, by renouncing its citizens' claims upon France for spoliations, secured a renunciation by France of all claims on our unfulfilled guarantee of the French possessions in the West Indies, and our other unfulfilled agreements under the treaties of 1778, which guarantee and agreements had been made in consideration of that military and naval aid which enabled us to secure our independence. Hence, as already

stated, the French spoliation claims were, in a very direct sense, a part of the price of the independence of the United States.

The United States having, for its own advantage, released France from the claims of American citizens, which claims were undoubtedly valid by the law of nations, transferred to itself, by every principle of justice and equity, the obligation to pay those claims, especially as it had encouraged its citizens, during the period of the spoliations, not to abandon foreign trade, and had promised them protection against ultimate loss; but *no court existed* with jurisdiction to receive proof of the claims, much less to give judgment for them. Worse than this, the obligation of the government to pay any claims whatever, except those due by express contract, was not yet fully recognized. Had the Court of Claims existed in 1801, common sense, as well as common justice, would have required that that court be at once given jurisdiction to hear and determine the French spoliation claims, with the right of appeal to the Supreme Court on any disputed points of law, while the evidence was still fresh; but as it was, no one dreamed of regarding the matter as one for a court to handle, and the only recourse was to the bounty of Congress.

Shortly before the ratification of the new French treaty, there had been a change of administration at Washington, accompanied by a similar change in Congress, and the new administration, finding it necessary to make some pledges, had pledged itself to economy. The merchant and underwriting classes, who had suffered from the spoliations, were still largely opposed to the party in power, which may possibly account for the lack of any enthusiasm, on the part of Congress, in behalf of these claims. Whatever the precise cause, no relief was given to the claimants, and as years rolled on, and the new States of the West came into the Union, their representatives knew little and cared less for the claims of Easterners, and the cause of the sufferers from French spoliations attracted less and less support They were not without able champions, and bills for their

relief were repeatedly passed by one house of Congress, but only to fail of passage in the other. Twice such a measure successfully ran the gauntlet of both houses, but was killed by the veto of a President who presumably knew but little of the facts, and never suspected that he was acting in gross violation of justice and good faith. Even when the Court of Claims was ultimately established, all claims growing out of any treaty stipulation were expressly excluded from its jurisdiction, so that, as the Government's obligation toward the French spoliation claimants grew out of the treaty of 1801, they remained as helpless as before.

For a long time these claims were practically abandoned and forgotten, but finally, after every single original claimant, other than a corporation, must have gone to his grave, the matter was revived, and the Act of January 20, 1885 (23 Stats. 283), authorized the claimants and their legal representatives to present their claims to the Court of Claims within two years. Most unfortunately, that court was not authorized to give judgment, but only to decide upon the validity of each claim presented, and to report to Congress its conclusions of fact and law in each case, thus reserving to that body the decision as to actual payment. The loss of the necessary evidence (liable enough to disappear in the course of ninety years) has barred many cases, but the worst feature of the case has been the indisposition of Congress to pay the claims, even after their validity had been clearly established by a thorough trial. Many of the cases have not even yet been tried, and many which have been favorably decided have not yet been paid. All this great injustice could have been avoided at the start had a right of suit been granted in 1801.

In England, from the earliest times, the property rights of the subject, as against the crown, seem to have been more readily enforced than, until very recently, those of the American citizen, as against his own government, could ever be. That somewhat apocryphal work, the "Mirrour of Justices", says:

> It was ordained that the King's courts should be open to all plaints, by which they had original writs without delay, as well against the King and Queen as against any other of the people, for every inquiry save where there is to be vengeance of life or member. (Bk. I, Chap. III, p. 11, Seld. Soc. ed.)

This remedy was, however, more theoretical than practical, for the same work says, in regard to abuses (Bk. V., Chap. I, p. 156):

> The first and sovereign abuse is that the King is beyond the law, whereas he ought to be subject to it, as contained in his oath.

Chief Baron Comyns, in his Digest (Action, C. 1) also said:

> Until the time of Edward I, the King might have been sued in all cases as a common person. . . . But none shall have an action against the King, but one shall be put to sue to him by petition.

And in another place he said (Praerog., D. 78):

> The King cannot be sued by writ, for he cannot command himself.

It may well be doubted whether even Saxon England was so democratic as to admit of the king's being sued *in the same way* as a subject, but it is practically certain that there was always some legal remedy for injuries due to the act of the crown. By the time of Edward I, at least, this remedy was the petition of right, which was really a petition for leave to sue. Later on the manifestation or plea of right *(monstrans de droit)* came into use, and was of broader application. Both of these proceedings could be instituted either in the Chancery or the Exchequer, but in both of them justice was administered as a matter of grace only In more recent times the petition of right was so regulated by statute as to be made a thoroughly practical and efficient remedy for the invasion of individual rights by the sovereign power, the fiat being granted as a matter of right to any petitioner, whether subject or alien, except in very extraordinary cases.

The petition of right, being addressed to the sovereign in his individual capacity, was, however, out of the question in a country whose chief magistrate was not empowered to consent to the bringing of a suit against the State; but one

might have expected that in such a country, where the people are declared to be the sovereign, and the government is simply their representative or agent, the right of the citizen to sue his own government would be regarded as fundamental without the need of any legislation to authorize the suit. Such is not the case, however, as regards either the United States or the States individually. As a matter of theory, it was not disputed that the words of the Constitution (Art. III, sec. 2), "the judicial power shall extend . . . to controversies in which the United States shall be a party", were meant to refer to cases in which the government should be defendant, as well as those in which it should be plaintiff; but this ample provision in the Constitution makes it all the more extraordinary that for nearly eighty years after that instrument was adopted no court existed with jurisdiction to render a binding judgment in a suit brought against the United States.

Apparently the fact that a judgment against the government would have to be enforced by the executive branch of that same government was regarded as too great a stumbling-block to be got over without legislation. Thus in *Chisholm* v. *Georgia* (2 Dall, 419, 478), in 1793, where it was held that citizens of one State could sue another State in the Federal Courts, Chief Justice Jay pointed out that the judgment would be enforced by the United States, but he suggested that "in case of actions against the United States, there is no power which the courts can call to their aid". He added:

> I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is or is not now the case ought not to be thus collaterally and incidentally decided. I leave it a question.

Later judges, however, did not even treat the question as open. On the contrary, without undertaking to reason the matter out, they always regarded it as settled that the government could not be sued unless such a suit were authorized by statute. Thus Marshall, C. J., said in 1821, in *Cohens* v. *Virginia* (6 Wheat. 264, 411):

> The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.

To the same effect are *U. S.* v. *Clarke* (8 Pet. 436); *U. S.* v. *McLemore* (4 How. 286); *Hill* v. *U. S.* (9 How. 386).

The Act of March 3, 1797, Sec. 3 (1 Stats. 514), authorized the defendant, in a suit by the United States, to set off any claim which the accounting officers of the Treasury had previously disallowed, and in *United States* v. *Fillebrown* (8 Pet. 28), a judgment that the United States was indebted to the defendant in the sum of $430 was affirmed; but in *De Groot* v. *United States* (5 Wall. 419) and *United States* v. *Eckford* (6 Wall. 484), it was stated that no judgment could be rendered against the Government, even though, on striking a balance, it should be judicially ascertained that the Government was indebted to the defendant. One might have expected that the original judiciary act would have given the district courts jurisdiction of suits against the government, but the influence of the idea, *"Rex non potest peccare"*, was too strong to permit of such an innovation, even though the substitution of *"Republica"* for *"Rex"* has utterly destroyed all legal ground for the maxim, as applied to this country. In fact, practically speaking, this maxim was more strictly followed in America than it had been in England, for Congress gave the citizen no petition of right, such as the Englishman had long enjoyed, and which, if not all that could theoretically be desired, was a substantial guarantee of justice.

This does not mean that claims against the government could not be presented for payment. As soon as the Treasury Department was established, the accounting officers were daily occupied in paying what the government owed for contracts of all kinds; but if those officers refused or cut down a claim, further relief could only be had from Congress itself. This was a serious violation of the principle of the separation of powers, a principle which the framers of the Constitution had in the main consistently observed. It is for Congress to enact the laws upon which the liability

of the government to individuals depends, and also, inferentially, "to pay the debts of the United States" (Const., Art. I, Sec. 8), but it should properly be for the courts to decide what that liability may be in any given case, just as much as in controversies between individuals, and for Congress to pass upon such a matter was an exercise of judicial power by a legislative body—a violation of a most salutary principle, and sure to lead to grave abuses.

It is true (as stated in *United States* v. *Realty Co.*, 163 U. S. 427, 440) that—

> Under the provisions of the Constitution (Art. I, Sec. 8) Congress has power to lay and collect taxes, etc., "to pay the debts" of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object.

It is also true, as stated in the same case, that—

> The term "debts" includes those debts or claims which rest upon a purely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. . . . The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body.

All this must be admitted, and yet it does not follow that the power to appropriate the money required to pay the debts of the United States implies also the power to decide what debts are legal and what not. The existence of that power was, however, assumed from the first; or it might be truer to say that no distinction was made between claims purporting to be legally due and those confessedly based upon moral or honorary considerations only; and practically all claims were presented in the form of appeals to the bounty of Congress. At all events it is probably useless, at this late day, to question the abstract power of Congress to pass upon the legality of claims, but, as regards the best interests of claimants and government alike, the exercise of this power has long been proved undesirable. It has grad-

ually been in great measure abandoned, and it is to be hoped that it will ultimately be given up altogether.

Within three years from the first sitting of Congress, it became necessary to provide some method for the investigation of claims, but while the first attempt was undoubtedly in the right direction, it was probably impracticable, and at all events so incomplete as to be unconstitutional. The Act of March 23, 1792 (1 Stats. 243), required the circuit courts to examine pension claims of invalid soldiers and sailors of the Revolution, and to determine the rate payable in each case, certifying their opinions to the Secretary of War, who was authorized, however, if he suspected imposition or mistake, to withhold the pension and report the case to Congress. Although the applicants for Revolutionary pensions were few in number compared with the pensioners of to-day, it may be doubted whether the circuit courts could have readily handled the volume of business thus thrust upon them, but the vital defect in the act was the lack of finality in the judgments which were to be rendered. Some of the courts assumed jurisdiction, at least as commissioners, but others totally refused, on the ground that only judicial powers could be conferred upon them, which last view was upheld by the Supreme Court. (See note to *Hayburn's Case,* 2 Dall. 409; *United States* v. *Yale Todd,* in note to *United States* v. *Ferreira,* 13 How. 40, 52.)

Congress had evidently grasped the idea that the application of a general pension law to particular cases was not a legislative act, and that it might be regarded as either judicial or executive, but Congress, while anxious to escape the drudgery of investigation, was unwilling to adopt the logical consequences of this idea, and to surrender to any other body the right of final decision in such cases. The Act of 1792 might be described as a straddle, and like most straddles it accomplished nothing. This being almost immediately realized, the Act of February 28, 1793 (1 Stats. 324), changed the system, providing that the evidence in pension cases should be taken before the district judges (sitting, of course, merely as commissioners), who were to

transmit it to the Secretary of War, who, after procuring further evidence from the records of his department, transmitted the cases to Congress for decision.

The necessity for some system in the handling of claims by Congress led to the establishment of a standing committee on claims, under a rule of the House of Representatives of November 14, 1794, "to take into consideration all such petitions, and matters or things touching claims or demands on the United States as shall be presented, or shall come in question and be referred to them by the House, and to report their opinion thereupon, together with such propositions for relief therein as to them shall seem expedient".

Claims continuing to increase in number and variety, standing committees were established from time to time to deal with particular classes of them, *e. g.*, the Committee on Public Lands (1805), on Pensions and Revolutionary Claims (1816), on Private Land Claims (1816), on Revolutionary Pensions (1825), and on Invalid Pensions (1831).

This system practically made every Congressman the sponsor for all the claims of his constituents, thereby not only impairing, by the mere waste of time, the efficiency of Congress in dealing with really important matters, but also destroying, in the mind of the public, all proper idea of what the position and duties of a Congressman really were. Of course there were always many Congressmen (as there are to-day) who enjoyed peddling out relief to individuals as a matter of favor, without much regard to actual justice; but the system was very galling to many men who had gone to Congress solely to work for the public welfare. Thus a leading member of the Philadelphia bar, who had consented to serve his city and nation in Congress, wrote in 1834:

> Mr. ——— says he does not see now how I am to leave public life. . . . Public life! Public death is the better name for it. . . . I find all my powers crushed under a weight of mechanical labor, from which I have made a positive determination to escape. I am the slave of every man who wants anything done here, of any sort, public or private. I dread the mail as much as a negro dreads the whip of his driver.

That Congress itself was alone to blame in the matter was plainly stated by Mr. Justice Story in 1833, when he wrote:

It has sometimes been thought that this is a serious defect in the organization of the Judicial Department of the National Government. It is not, however, an objection to the Constitution itself; but it lies, if at all, against Congress, for not having provided (as it is clearly within their constitutional authority to do) an adequate remedy for all private grievances of this sort in the courts of the United States. (*Story's Comm. on the Const.*, Sec. 1678.)

Efforts at reform were made from time to time, but without success. Thus in 1826 Mr. Edward Livingston, of Louisiana, offered a resolution:

That the Committee on the Judiciary be instructed to inquire into the expediency of establishing some mode by which all demands against the United States for services, or for articles furnished, or moneys advanced for their use, not allowed by the proper accounting officers, should be submitted to a court of justice for investigation and provisional decision, reserving to Congress the right of finally deciding whether such decisions shall be carried into effect, and also, under the like reservation, investigating the title of individuals or bodies corporate to lands claimed by the United States.

The fatal defect in this plan was that it left the final decision with Congress, instead of the courts, but the time was not yet ripe for even such a half-measure as this. In 1838 Mr. Thomas Henry, of Pennsylvania, suggested a more complete reform, but with no better success. He proposed "that the Committee of Claims be instructed on inquire into the expediency of establishing by law a board of commissioners, for the adjustment and final settlement of all claims against the United States". The committee itself favored the idea, but it does not seem to have ever been embodied in any definite bill upon which action could be taken.

Where officers of the Government occupied real estate in the name of the United States, the owner had indeed an adequate remedy, for it was early held that ejectment would lie against the custodians, and that if judgment were rendered for the plaintiff, he could recover the property, even though the Government had erected valuable buildings thereon. (*Meigs* v. *McClung's Lessee*, 9 Cr. 11.) In that case the Government had acquired certain land from Indians by treaty, but its officers had assumed the right to occupy the plaintiff's land instead, as it was better suited to the Government's needs. Marshall, C. J., said:

The facts, that the agents of the United States took possession of this land lying above the mouth of the Highwassee, erected expensive buildings thereon, and placed a garrison there, cannot be admitted to give an explanation to the treaty, which would contradict its plain words and obvious meaning. The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence, and without compensation. This Court is unanimously and clearly of opinion that the Circuit Court committed no error in instructing the jury that the Indian title was extinguished to the land in controversy, and that the plaintiff below might sustain his action.

This case, decided in 1815, well illustrates the utter unreasonableness of Congress in so long delaying to provide for suits against the Government. Had the Government taken possession of the land under a contract of sale, and had then failed to pay the purchase-money, the plaintiff would have been dependent on the grace of Congress for relief; but without any contract he could effectually assert his legal rights. Moreover, in the case of claims for customs duties illegally exacted and paid under protest, there was a common law remedy against the collector, provided the importer notified the collector of his intention to sue, and that the money should not be paid over into the Treasury. This was on the settled doctrine that "where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal, if he has notice not to pay it over". *(Elliott* v. *Swartwout,* 10 Pet. 137, A. D. 1836.)

This remedy was, however, taken away (inadvertently, perhaps, but none the less positively) by the Act of March 3, 1839, Sec. 2 (5 Stats. 348), requiring collectors of customs to pay over all money received for duties under protest, and not to hold it to abide the event of a suit. That the statute had this effect was decided early in 1845 in *Cary* v. *Curtis* (3 How. 236); and Congress being in session, relief was at once given by the Act of 26 February, 1845 (5 Stats. 727), afterwards R. S. 3011, providing that customs duties illegally exacted and paid under protest, could be recovered from the collector in an action at law, triable by jury. The recourse against the government in such proceedings was indirect, but this was only a matter of form,

as the government always provided for the payment of such judgments.

That Congress should have recognized the necessity of providing for suits to recover duties believed to have been illegally exacted, may be regarded as a forward step, but its failure to see that the obligation to refund such duties did not really stand on any higher ground than the obligation to pay money due on contracts, or any other government debts, simply shows how small a part logic plays in American legislation.

The first measure providing for a forum in which the citizen could bring suit directly against the government was the Act of February 24, 1855 (10 Stats. 612), establishing the Court of Claims. As a matter of fact, this act gave very incomplete relief, for although it established a Court of Claims, consisting of three judges, to be appointed by the President, and to hold office during good behavior, yet this so-called court was not empowered to give final judgments, and hence was not really a court at all. The greater part of the act reads as if it had been originally drafted with the idea of providing for final judgments, but apparently Congress could not bring itself to surrender any of its old authority over claims, and changed the bill so as to preserve that authority. The act required the court to—

> hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, . . . and also all claims which may be referred to said court by either House of Congress.

The court was required to report to Congress monthly during each session the cases acted upon, with statements of all the material facts established by the evidence and with their opinions as to what the decisions should be; but these reports were also to give all the evidence in each case, and Congress was to decide finally whether to pay the claims or not. The court had the power to call on the departments for information, and to issue subpœnas, and false testimony before it was made perjury, but it was in fact only an inves-

tigating committee to prepare cases for final action by Congress, much as a Master in Equity, by his report upon the proceedings before him, prepares a case for final action by the court. The security of the tenure of the judges guaranteed, as far as such a guarantee is possible, the impartiality of the tribunal, and claimants could directly institute proceedings in it, so that its establishment was a forward step, but it went only a little way.

The Civil War vastly increased the activities of the government and involved it in an immense number of contracts, thereby necessarily increasing the volume of disputed claims. In self-defence, as well as in justice to claimants, Congress was compelled to abandon its function as a final tribunal in all claims cases; and accordingly, by the Act of March 3, 1863 (12 Stats. 765), it reorganized the Court of Claims.

This act was undoubtedly intended to give claimants an opportunity to have their cases judicially heard and determined. The judges were increased to five, a seal was provided for, and the court's jurisdiction was extended to cover all set-offs and counter-claims on the part of the United States, but claims growing out of treaties were specifically excepted and all proceedings not brought within six years after the claim accrued were forever barred, subject to exceptions in cases of disability. The court was empowered to enter judgment in all cases before it, with an appeal to the Supreme Court of the United States by either party in cases involving over $3000, while in test cases, which would settle the law for classes of similar claims, the government was entitled to an appeal, without regard to the amount involved. Judgments were to be paid out of any general appropriation made by law for the payment of private claims.

So far the act established a complete system of dealing judicially with all claims within the somewhat limited jurisdiction of the court, but the act contained one short section whose effect Congress probably failed to fully comprehend, and which, as long as it remained in force, made the system in great part unworkable. This section read:

No money shall be paid out of the Treasury for any claim passed upon by the Court of Claims, until an appropriation therefor shall be estimated for by the Secretary of the Treasury.

This section was discussed in the first case appealed under this act (*Gordon* v. *United States,* 2 Wall. 561; 117 U. S., 697), which deserves careful attention, as it enables us to understand just what the status of the Court of Claims is, and why it is that, since the repeal of the section just referred to, its judgments are really binding on the United States. This appeal was submitted in December, 1863, argued January 3, 1865, and dismissed just before the close of the term, Chief Justice Chase announcing the judgment as follows:

We think that the authority given to the head of an executive department by necessary implication in the Fourteenth Section of the amended Court of Claims Act, to revise all the decisions of that court requiring payment of money, denies to it the judicial power, from the exercise of which alone appeals can be taken to this court. The reasons which necessitate this conclusion may be more fully announced hereafter. At present, we restrict ourselves to this general statement, and to the direction that the cause be dismissed for want of jurisdiction.*

The opinion which the Chief Justice said might be announced was never officially handed down, but Chief Justice Taney, prior to his death on October 12, 1864, had prepared an opinion expressing his own views, probably after the court had reached a conclusion on the case as submitted, but before an argument was ordered. This paper was carefully considered by the court in reaching its decision (announced March 9, 1865), and it was proposed to make it the basis of the court's opinion, but no such opinion was ever written. Taney's opinion was published twenty-one years later (117 U. S., 697), and may be understood as practically official. It states that the provision that no claim should be paid until after an appropriation therefor should be estimated for by the Secretary of the Treasury meant that—

Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury,

* This statement is not found in the report of the case in 2 Wall., 561, but is quoted in the opinion in *U. S.* v. *Jones,* 119 U. S. 477, 478.

and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment, and whether it is paid or not does not depend on the decision of either court, but upon the further action of the Secretary of the Treasury, and of Congress.

It was true that the obnoxious section referred only to the estimate, and did not in terms require a specific appropriation by Congress, but the opinion held that that requirement necessarily followed.

When the Secretary asks for this appropriation, the propriety of the estimate for this claim, like all other estimates of the Secretary, will be opened to debate, and whether the appropriation will be made or not will depend upon the majority of each House. The real and ultimate judicial power will, therefore, be exercised by the Legislative Department.

The opinion further stated that the award of execution is an essential part of every judgment passed by a court exercising judicial power, so that as neither the Court of Claims nor the Supreme Court had, under this act, any power to award execution, what was called a judgment was really no judgment at all, but merely an opinion, which would remain a dead letter unless Congress should at some future time sanction it by a statute. As the Supreme Court derived its powers and duties from the Constitution, Congress could not impose upon it the authority or duty (not imposed by the Constitution) of hearing appeals from judgments which were not final, or of giving opinions in cases where its own judgment would not be final and conclusive upon the rights of the parties, and where no process of execution could be awarded to carry it into effect.

The Constitution delegated no judicial power to Congress; and while it had authority to pay claims against the United States, or to establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any such claim, it could not assume authority to award or refuse execution of any judgment rendered by a court of the United States. Such action on its part would be an unconstitutional interference, by the leg-

islative branch of the government, with the functions of the judicial branch, and as Congress must always be presumed to have intended to confine itself to its proper constitutional functions, the statute had necessarily to be construed as creating an advisory tribunal only, not a court, and the provision for an appeal was consequently invalid.

It is probable that Congress, in requiring an estimate by the Secretary of the Treasury, had simply meant to provide some means of being informed that money was needed to pay judgments, and had not foreseen the view ultimately taken by the Supreme Court, which view was of course made public, although no formal opinion was then handed down. At all events, the obnoxious section was repealed by the Act of March 17, 1866 (14 Stats. 9), and the provision for payment of judgments was left as it stood in Section 7 of the Act of 1863 (now R. S. 1089).

The Supreme Court at once took notice of the change, and prepared to entertain appeals from the judgments of the Court of Claims, at last established as a court in reality and not merely in name. The rules of the Supreme Court in regard to these appeals were at once drawn up and published (3 Wall. vii), and in accordance with the opinion in *Gordon* v. *United States,* it has ever since been recognized that a judgment of the Court of Claims is as binding as that of any other court, and that while the court has never been specifically authorized to levy an execution upon government property to pay such a judgment, yet for Congress to neglect or refuse to pay it would be unconstitutional, an interference by the legislative department with the functions of the judicial.

The first case heard on appeal, after the Act of March 17, 1866, made appeals possible, was *DeGroot* v. *United States* (5 Wall. 419); and for twenty years thereafter no doubt was entertained as to the right of the Supreme Court to exercise appellate jurisdiction in such cases. In *United States* v. *Jones* (119 U. S. 477, decided in 1886), the claimant's counsel moved to dismiss the Government's appeal, contending that Section 236 of the Revised Statutes required the Treas-

ury Department to settle and adjust all claims, and that this interfered with the finality of the Court of Claims judgments, so that they were not appealable. That section reads:

> All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.

The Court denied the motion, saying:

> This section of the Revised Statutes is not new law. It was first enacted as Sec. 2 of the Act of March 3, 1817, c. 45, 3 Stat. 366, and it has been in force ever since. It evidently relates to an entirely different class of duties from that to which the payment of the judgments of the Court of Claims belongs. As to such judgments, the duty of the Secretary of the Treasury is to pay them out of "any general appropriation made by law for the payment and satisfaction of private claims, on presentation" to him "of a copy of said judgment, certified" according to law. Rev. Stat., Sec. 1089. Of course, this applies as well to special appropriations made for the satisfaction of the particular judgment. Under this statute the Secretary has no power whatever to go behind the judgment in his examination.
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> Reference is also made to an Act of March 3, 1875, c. 149, 18 Stat. 481, which provides for "deducting any debt due the United States from any judgment recovered against the United States by such debtor"; but this gives the accounting officers of the Government no authority to re-examine the judgment. It only provides a way of payment and satisfaction if the creditor shall, at the time of the presentation of his judgment, be a debtor of the United States for anything except what is included in the judgment, which is conclusive as to everything it embraces.
>
> It is unnecessary to pursue this branch of the case further. We are entirely satisfied that, as the law now stands, appeals do lie to this court from the judgments of the Court of Claims in the exercise of its general jurisdiction.

While the Court of Claims owes its existence to Congress, and can therefore be required to hear cases without giving a judgment (as it does in what are called Congressional cases), yet as far as concerns its general jurisdiction it is (and has been ever since March 17, 1866) an inferior court of the United States, within the meaning of Section 1 of Article III of the Constitution; and hence its judges hold office during good behavior, as required by that Constitution, and as should be required in the case of all judicial officers, by all constitutions. In the case of this court it is peculiarly essential that this should be so. The contingent fee system prevails to a very large extent in the

Court of Claims, so that the claimant's counsel has almost always a direct interest in the result, and this being so it is in the highest degree necessary that the impartiality of the court be guaranteed in every possible way. It does not appear that the court's reputation for impartiality has ever been assailed; but as its work, though extremely varied and important, concerns exclusively matters such as had previously been dealt with by Congress, and in regard to which the practice of what is called "lobbying" was popularly supposed (whether justly or not) to play no small part, the reputation of the court itself, in the opinion of the public, has probably never yet been as high as was really deserved. The prosecution of claims seems to have been thought, most unreasonably, an inferior species of litigation, and this unreasonable view seems to have affected the estimation of the court itself. Gradually, however, the court has won for itself something approaching its true position as an indispensable branch of the national judiciary. That it has done so is probably due more to the character and labors of former Chief Justice Nott (Associate Justice from 1863 to 1897 and Chief Justice from 1897 to 1906) than to those of any other man.

By the Act of March 3, 1887 (24 Stats. 505), commonly called "the Tucker Act", the United States district courts were also given jurisdiction over all matters within the general jurisdiction of the Court of Claims, in cases where the amount does not exceed $2000, and the United States circuit courts were given similar jurisdiction in cases where the amount exceeds $1000 and does not exceed $10,000, but the Act of June 27, 1898, Sec. 2 (30 Stats. 494), abolished this concurrent jurisdiction in suits brought by government officers for salary or other compensation. With this exception, any claimant can sue the United States in the local federal courts, in cases not involving over $10,000, as readily as he can in the Court of Claims, but this concurrent jurisdiction is rarely resorted to, partly because the habit of taking all such cases to Washington could not readily be overcome, though probably in the main because

there are no court costs to be paid in the Court of Claims, so that an unsuccessful litigation there involves little expense.

Sections 9 and 10 of the same Act of March 3, 1887, provide for an appeal or writ of error from decrees or judgments of the federal, district and circuit courts in claims cases, upon the same conditions as appeals under Section 707 of the Revised Statutes, so that the Government is entitled to appeal from a judgment of a district court, no matter how small the amount involved, although in other than claims cases such a judgment is not appealable unless the matter in dispute exceeds the value of $5000. (*United States* v. *Davis*, 131 U. S. 36.) Under that statute the appeal or writ of error in claims cases lay directly to the Supreme Court of the United States, but since the passage of the Act of March 3, 1891 (26 Stats. 826), the several circuit courts of appeals constitute the appellate tribunals for claims cases brought in the local federal courts, except in cases involving matters as to which a direct appeal to the United States Supreme Court is provided for. It would have been more logical to make the Supreme Court the appellate tribunal in all suits against the Government, no matter in which court they might happen to be brought.

The duty of defending the United States against suits in the Court of Claims falls upon an Assistant Attorney General, who has a number of assistant attorneys under him, but Indian Depredation and French Spoliation cases, probably because of their somewhat distinctive characters, have always been treated as matters entirely apart from the general work of what may be called the regular claims branch of the Department of Justice, and the defence in such cases is entrusted to other law officers of that department. Where the government is sued in the local district or circuit courts, the District Attorney represents it, and the case is tried by the court without a jury.

At this point it may be well to contrast the attitude of the National Government towards claimants with that of the

several States of the Union. The Constitution of Pennsylvania (Art. I, Sec. 11) provides:

> Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

The Act of July 10, 1901, Sec. 1 (P. L. 637), provides:

> That the courts of common pleas of the several counties of this Commonwealth are hereby clothed with jurisdiction in all cases in which the Commonwealth is a party: Provided, That nothing in this act shall be construed to apply to tax cases to which the Commonwealth is a party.

As was noticed above in regard to the judicial power of the United States, these words must include cases in which the Commonwealth is defendant, but no general law authorizing such suits has ever been passed. From time to time special laws have granted individual rights of suit against the State (*e. g.* Act of 25 April, 1903, P. L. 315), in spite the constitutional prohibition of special laws "granting to any corporation, association or individual any special or exclusive privilege or immunity" (Art. III, Sec. 7). It is hard to see how an act granting a special right to sue the State can be reconciled with that prohibition.

Turning to the other States, we find no uniform system in regard to the treatment of such cases. In Indiana, Massachusetts, Mississippi, Nebraska, New York, South Dakota, Virginia, Washington and Wisconsin, the bringing of suits against the State is provided for by general laws, and in Nevada this right is granted to a certain class of claimants.

In Michigan certain officers constitute a Board of Auditors, to pass upon all claims, and their decision is final. This board necessarily lacks the independence of a court, and its decisions cannot be reviewed on appeal. In Utah there is a similar board called a Board of Examiners.

In Idaho and North Carolina the Supreme Court entertains suits against the State, but its decisions are mere recommendations to the Legislature.

The Constitutions of California, Delaware, Kentucky, North Dakota, Tennessee and Wyoming contain practically

the same provisions as does that of Pennsylvania, but, as with us, there is no general law granting a right of suit. In fact, the Tennessee Legislature has gone so far as to prohibit such suits.

The Florida and Oregon Constitutions authorize the Legislature to grant a right of suit by general law only, but apparently this has never been done in either State. The Louisiana Constitution regulates laws conferring a right of suit, but apparently contemplates special acts only.

The Constitutions of Colorado, Connecticut, Georgia, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, Texas and Vermont are silent on the subject of suits against the State, but while this silence would not prevent the Legislatures from authorizing such suits, this seems to be done only in individual instances.

Finally, the Constitutions of Alabama, Arkansas, Illinois and West Virginia strictly forbid all suits against the State, for whatever cause. It is hard to imagine what the citizens of those States expect to gain by positively forbidding claimants to obtain justice as a matter of right, and forcing them to seek it of the Legislature as a special favour.

Taking it all in all, it is rather a melancholy reflection that less than a quarter of our States are willing to follow the example of the National Government, and to meet their citizens on equal grounds in their own courts, for it is obviously for the advantage of the government, as well as of the citizen, that this should be done. The purpose for which the Court of Claims exists is well expressed in its motto, placed above the Chief Justice's seat on the bench, *"Reipublicae Civibusque"*—a permanent declaration that the court acts both for the nation on the one hand, and for the citizens on the other, by determining, through orderly legal procedure, without fear or favor, the respective rights of each in civil causes. In so acting, the court not merely reconciles, as far as possible, the differences which arise between the two, but also helps to develop and preserve, on the part of government officers, a due regard for the rights

of all citizens, and on the part of the citizens, the feeling that the government is not a stranger to them, which will cheat them whenever it can, and which they may fairly cheat in their turn, but that it is *their* government, administered in *their* interest, dealing fairly with them, and according them, through its courts, as perfect justice as fallible human beings can administer. Who can deny that such a court is an important agency in maintaining that confidence of the citizen in his government, and that public respect for it, without which no government can hope to permanently endure?

Every lawyer who cares for the honor of his profession must feel, however, that the magnitude of the interests involved in the litigation which takes place in the Court of Claims demands that the legal staff of the United States, those who are called upon to represent it in that court, should receive the same fair treatment which is accorded the scientific and medical staffs and the officers of the army and navy. In the Geological Survey, for instance, or the many scientific positions under the Department of Agriculture, appointments and promotions are made for proved merit and fitness, and the political views of the appointee are not inquired into. So with the surgeons of the army and navy, not to mention the officers of the various arms of those services. In short, the men who serve their country in every learned profession except the law are free to hold such political opinions as they think fit; yet in spite of the fact that the legal profession, above all others, trains men to take broad views, to look on all sides of every question, and to divest themselves of all irrelevant prejudices as regards the performance of their work, the professional staff of the Department of Justice is to this day a purely partisan body. Occasionally men are retained as special counsel without regard to politics, but every permanent professional position in that department is treated as party spoils. To change one's legal counsel pending important litigation, merely because of a change of parties in the control of the administration, is at least as unwise as it would be to change

military officers, for the same cause, during a campaign; and yet the former is the invariable practice, in spite of the fact that politics cannot possibly enter into the question of the government's rights under a contract, or whether a particular invention is covered by a patent, or whether the patent claimed to cover it is valid, or any other of the thousand kinds of questions involved in suits in the Court of Claims.

Twenty-six years ago the pressure of public opinion compelled Congress to provide for a non-partisan system of appointing and promoting department clerks, letter carriers, and other civil servants of the lower grades, although any man of fair intelligence can learn the duties of such positions in a few days, or at most a few weeks; and there is all the more reason that such a system should be followed in the case of men who have given years of laborious study to qualify them for their work. It is to be hoped that in time the Bar of this country will insist that those of its members who may seek to serve their country in their profession shall stand on the same level with the men of other learned professions, and not be cast aside merely because, in the exercise of their private judgment, they may have adopted political views which do not conform precisely to those of the particular administration which chances to be in power.